SUPREME COURT, U.S.
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No. 00-1142

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ANDRE DELAWARE,

Respondent.

On Petition For Writ Of Certiorari
To The Appellate Court Of Illinois, First District

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

On May 31, 1997, at 6:30 a.m. while on routine patrol Chicago Housing Authority ("CHA") police officer, Jesse Kuykendoll, drove with two partners in a CHA police car southbound down State Street in Chicago, Illinois. While driving southbound down State Street, Kuykendoll stopped his car at the red light on the corner of State and 51st streets. (R. B4-5; B14; B16).

While stopped at the red light, Kuykendoll thought that he heard gun shots being fired from a building at 5135 S. Federal Street. Kuykendoll then drove into the parking lot at 5135 S. Federal to investigate the suspected gun shots. (R. B6-7; B14).

In the parking lot at 5135 S. Federal, Kuykendoll observed a group of between three to ten males. Defendant Andre Delaware was not a member of this group. In fact, Delaware was never in or near the building located at 5135 S. Federal Street.

Officer Kuykendoll suspected someone in the group of three to ten males fired the gun shots; therefore, Kuykendoll and his partners approached the group to investigate. However, every person in this group ran away and into the building at 5135 S. Federal Street.

The three officers chased after and followed the fleeing group into the building at 5135 S. Federal. While in the staircase in the building, the three officers lost every single fleeing man in the group. Thus, Kuykendoll and his two partners failed to catch anyone from the group suspected of firing the gun shots. After losing the entire

group in the staircase, the officers then exited from the building at 5135 S. Federal. (R. B7; B16-18).

Next, the three officers went to a nearby but different parking lot at 5100 S. State Street. The officers arrived in this different parking lot five minutes after losing the entire group of suspected shooters in the staircase of the building at 5135 S. Federal. (R. B6; B18).

Five minutes after losing the entire group of men suspected of firing the shots, the officers continued to search for weapons, bullets and shell casings in the different parking lot at 5100 S. State Street. The officers did not find any guns or bullets or shell casings in the parking lot at 5100 S. State Street.

While searching the ground of the State Street parking lot, Kuykendoll saw Defendant Delaware depart from a Jeep parked in the lot at 5100 S. State Street. Kuykendoll was 20 yards away from Delaware at this time. (R. B8-9; B19).

Kuykendoll approached to ask Delaware about the gun shots previously fired in the other parking lot at 5135 S. Federal Street. Delaware, however, ran away from Kuykendoll and left open the front door of the Jeep. Delaware ran into the building at 5100 S. State Street.

Kuykendoll and his two partners chased after and followed Delaware into the building at 5100 S. State Street. Delaware ran into apartment #303. Kuykendoll and both of his partners all entered into and seized Delaware inside of the apartment.

Kuykendoll testified that he placed Delaware under arrest in the apartment. (R. B5). Kuykendoll handcuffed

Delaware in the apartment. Kuykendoll placed Delaware under his control and custody in the apartment. Kuykendoll searched Delaware in the apartment. Kuykendoll found no weapons nor narcotics on Delaware. All three officers were armed while placing Delaware under arrest in the apartment. Kuykendoll said that he placed Delaware under arrest inside of the apartment. (R. B20-22).

Kuykendoll did not have a warrant for Delaware. Kuykendoll did not see Delaware commit any crime before arresting him in the apartment. (R. B5). Kuykendoll did not receive any information about Delaware possessing or shooting a gun. Kuykendoll did not see anyone fire a gun before he arrested Delaware. (R. B14-16). Kuykendoll said Delaware did not possess nor drop any weapons or narcotics during the chase into apartment #303 in the building at 5100 S. State Street. (R. B5; B9).

After placing Delaware under arrest in the apartment, the three armed officers transported the handcuffed Delaware to the Jeep in the parking lot. Upon arriving at the Jeep, Kuykendoll told Delaware that he felt Delaware was involved with the earlier gun shots. Kuykendoll then asked for permission to search the Jeep. (R. B11).

Delaware told Kuykendoll that he did not have any weapons in the Jeep. Delaware also said that he did not have a problem with Kuykendoll looking in the Jeep. (R. B11-12; B23).

Then, Kuykendoll searched throughout the Jeep. Kuykendoll did not find a gun in the Jeep. Kuykendoll

did not find bullets or shell casings in the Jeep. Kuykendoll recovered a plastic bag containing 138 grams of cocaine from under the Jeep's arm rest. The police never found a gun at any time during this incident. (R. B6; B12; B24).

Delaware filed a Motion to Quash and Suppress. At the hearing defense counsel argued that Kuykendoll arrested Delaware in the apartment without probable cause and the three armed officers improperly transported the handcuffed Delaware to the Jeep in the parking lot. Defense counsel argued that the consent was tainted by the unlawful arrest in the apartment without probable cause. (R. B27-28).

The trial court found that the police acted reasonably and found that Delaware's consent was valid. Accordingly, the trial court denied the Motion. (B30-31).

REASONS FOR DENYING THE WRIT

This Court should deny this petition for lack of jurisdiction because Petitioner did not make these "public safety" arguments in the trial court or in a timely manner in the Illinois courts of review. In fact, Petitioner has presented different legal theories at each different stage of the appellate process.

Furthermore, this Court should deny this petition because Petitioner misrepresents and omits decisive facts. These facts undermine Petitioner's arguments. First, Petitioner says the seizure of Defendant in the apartment and

subsequent transportation of him to the Jeep were conducted during an extended *Terry* stop instead of during an arrest. However, Petitioner ignores State witness Kuykendoll's testimony about placing Defendant under arrest in the apartment. Second, even though the police never found a gun in this case, Petitioner claims Kuykendoll reasonably suspected a gun was in the Jeep. The record, however, fails to show that Kuykendoll had a reasonable articulable suspicion that a gun was in the Jeep. Third, Petitioner glosses over the quality of Kuykendoll's testimony. Kuykendoll testified that he recovered a plastic bag containing cocaine from under an armrest in the Jeep. In his police report, however, Kuykendoll recorded that Delaware fled from the Jeep with a plastic bag of cocaine in his possession during the chase to the apartment.

Finally, this Court should deny this petition because Petitioner fails to present any compelling reasons for granting this petition. Petitioner's legal authority for the "public safety" arguments is unavailing.

Therefore, the Illinois appellate court's holding in this case is proper in all respects and does not call for a review by this Court.

I. THIS HONORABLE COURT LACKS JURISDICTION BECAUSE PETITIONER FAILED TO PROPERLY RAISE THESE ARGUMENTS IN THE ILLINOIS TRIAL AND APPELLATE COURTS

Petitioner primarily argues that the seizure of Defendant without a warrant in the apartment and subsequent transportation of Defendant to the Jeep in the parking lot

were properly conducted during an extended *Terry* stop, instead of during an arrest requiring probable cause.

Petitioner claims the "public safety" exception to the warrant requirement authorized the police to seize Defendant in the apartment and then transport him to the Jeep in the parking lot without probable cause during an extended *Terry* stop. As legal authority for this dubious argument, Petitioner requests this Court to extend *United States v. Dombrowski*, 413 U.S. 433, 435 (1973). (*See* Petition for Writ at pp. 6-12).

Petitioner's second argument is that under *New York v. Quarles*, 467 U.S. 649 (1984), the police did not need to Mirandize Delaware after his unlawful arrest because of concern for the public safety. Also, in this argument Petitioner says the Illinois appellate court misapplied the facts about this consent being tainted by the unlawful arrest and the appellate court misapplied the law of *Brown v. Illinois*, 422 U.S. 590 (1975).[1] (*See* Petition for Writ at p. 13).

Petitioner, however, did not make these "public safety" arguments in the trial court. In the trial court neither party introduced evidence directly pertaining to "public safety." In the trial court neither party argued, for or against, expanding the "public safety doctrine" for application in this case. Thus, the trial judge never

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[1] *See* Rule 10 of the Supreme Court of the United States: "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

received the opportunity to decide whether the "public safety" exception applied to this case.

Likewise, Petitioner failed to make these arguments in a timely manner in the Illinois appellate court. In their "Brief and Argument," Petitioner did not request the appellate court to expand the "public safety" exception for application in this case.

The Illinois Appellate Court issued a nineteen page opinion in which a three person panel unanimously suppressed the seized cocaine and reversed this case outright without remand. The appellate court's well-reasoned opinion, from caption to conclusion, does not contain even a single mention of the arguments now raised by Petitioner.

After the appellate court issued its opinion, then Petitioner filed a petition for rehearing. In the petition for a rehearing, for the first time, Petitioner mentioned a "public safety" argument in one short sentence. (*See* last sentence on p. 8 of Petition for Rehearing). Petitioner never raised the *Quarles* argument at any time in the appellate or trial court.

The Illinois appellate court properly denied the petition for rehearing without addressing or even mentioning Petitioner's one sentence "public safety" argument. (*See* Petition for Writ at p. App. 20).

Next, Petitioner requested leave to appeal to the Supreme Court of Illinois. In this request Petitioner relied on *United States v. Buie*, 494 U.S. 325 (1990), to argue that the search of the Jeep was a reasonable "protective sweep." Petitioner again mentioned the "public safety"

theory in only one short sentence. Petitioner never asked the Supreme Court of Illinois to expand the "public safety doctrine" for application in this case. Petitioner never asked the Supreme Court of Illinois to extend the holding or rationale in *United States v. Dombrowski*, 413 U.S. 433, 435 (1973). The Supreme Court of Illinois properly exercised its discretion and refused to hear this case. (*See* Petition for Writ at p. App. 21).

Thus, Petitioner presented different legal theories at the different stages of the appellate process. In the trial court no evidence was introduced nor arguments made about the "public safety exception" to the warrant requirement. Petitioner's "public safety" theory has never been briefed by the parties at any time in the Illinois courts of review. Neither the trial nor appellate court had an adequate opportunity to decide the arguments now raised by Petitioner.

In *People v. Nau*, 167 Ill.App.3d 338, 521 N.E.2d 177 (2nd Dist. 1988), the trial court granted the motion to suppress because the State did not show that defendant knowingly waived his rights before confessing. The State filed an interlocutory appeal. As with Petitioner in this case, the State in *Nau* raised the "public safety exception" for the first time in the appellate court.

The Illinois appellate court in *Nau* held that under Illinois Law the State waived the "public safety exception" by not raising this theory in the trial court:

> The State presents for our consideration an alternative argument based upon the public safety exception to the Miranda rule which was

> created in New York v. Quarles [citation omitted]. Defendant correctly points out that the State did not present this issue to the trial court for consideration. Questions not raised in the trial court are generally deemed waived and may not be raised for the first time on appeal. [citation omitted]. As the Holloway court observed, a fundamental reason for the waiver rule is that the failure to raise an issue at the trial level will often cause the opposing party to forego presentation of available pertinent rebuttal evidence which could be relevant to disposition of the question. [citation omitted]. Had the State timely raised the issue of the public safety exception, defendant might have been able to produce evidence to show that it did not apply to this situation. Obviously, defendant cannot now do so. Consequently, we find that the State has waived its right to assert its alternative argument.

Id. at 349-50, 183.

See also People v. Turnage, 162 Ill.2d 299, 312-13, 642 N.E.2d 1235, 1241 (1994) (Supreme Court of Illinois refused to consider State's different theory for first time on appeal because no evidence on this theory presented in trial court); *People v. Holloway*, 86 Ill.2d 78, 426 N.E.2d 871 (1981) (Supreme Court of Illinois holds that State can not raise different theory for first time on appeal); *People v. McAdrian*, 52 Ill.2d 250, 287 N.E.2d 688 (1972) (same).

Therefore, under Illinois Law Petitioner is prohibited from raising the "public safety" theory for the first time on appeal to this Court. Petitioner's arguments were not considered by the trial court or by the Illinois courts of review.

Furthermore, this Court's own precedents hold that this Court lacks jurisdiction to decide issues not properly preserved or raised by a Petitioner in the State courts below. *See Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114 (1992) (United States Supreme Court does not have jurisdiction to hear issue not properly preserved for review by State appellate courts); *Fullerton v. Texas*, 196 U.S. 192, 25 S.Ct. 221 (1904) (United States Supreme Court lacked jurisdiction to decide issue raised for first time during petition for rehearing in state appellate court); *Jacobi v. Alabama*, 187 U.S. 133, 23 S.Ct. 48 (1902) (United States Supreme Court lacked jurisdiction to decide issue not raised in trial court and raised for first time in request for review to state Supreme Court); *Spies v. Illinois*, 123 U.S. 131, 8 S.Ct. 22 (1887) (United States Supreme Court lacked jurisdiction to decide issue not timely raised in or decided by state courts).

Therefore, Defendant respectfully requests this Court to deny this Petition because of the lack of jurisdiction.

II. PETITIONER MISREPRESENTS AND OMITS DECISIVE FACTS

First, Petitioner claims the seizure of Defendant in the apartment and subsequent transportation of him to the Jeep in the parking lot were conducted during an extended *Terry* stop instead of during an arrest.

However, Petitioner blindly ignores State witness Kuykendoll's testimony about placing Defendant under arrest in the apartment. Kuykendoll was the only witness to testify during this hearing. No witness said Delaware

was only subjected to a *Terry* stop in the apartment and parking lot.

Kuykendoll unequivocally testified that he placed Delaware under arrest in the apartment:

> Q [By defense counsel] Directing your attention to May 31, 1997, approximately 6:30 a.m. did you have an occasion to arrest my client defendant Andre Delaware about 6:30 a.m.?
>
> A [By Officer Kuykendoll] That is true, sir.
>
> Q And you in fact arrested him as he was entering his apartment Number 303, 5100 South State Street?
>
> A That's correct.
>
> Q And that's in Chicago, Cook County, Illinois?
>
> A Yes, sir.
>
> Q And prior to your arresting him at that time and at that place you had not seen him in the process of committing any crimes, is that correct?
>
> A That's correct.
>
> Q And you didn't have any arrest warrant or search warrant nor were you aware of any such arrest or search warrant authorizing the arrest and search of my client at that time and date.
>
> A No, we didn't have a search warrant or an arrest warrant. (R. at B5).
>
> . . .

Q And when you got up to this apartment it was inside the apartment that you actually physically placed him under your control and custody, correct?

A That's correct sir.

Q And in fact you then searched him for your own protection to see if he had any weapon on him, right?

A That's correct.

Q And you didn't find any weapon on him, did you?

A No, sir, we didn't find a weapon.

Q And during that search you didn't find any controlled substances on him, did you?

A No, sir.

Q In fact you handcuffed him at that time, right?

A Yes, we did.

Q And you took him from the apartment back down to the parking lot where that white car was, right?

A That's correct. (R. at B22-23).

This Illinois appellate court carefully and correctly found that Officer Kuykendoll exceeded a *Terry* stop and placed Defendant under arrest in the apartment:

> The officers' conduct in detaining defendant, handcuffing defendant, removing him from the apartment, removing him from the building, and taking him to the parking lot must be considered in determining whether the investigative seizure went beyond the limited scope and

> duration of a Terry stop and became an unlawful arrest. The State argues that defendant was not arrested until the discovery of drugs in the Jeep, and before that, the police officers could legally detain defendant as part of their investigation. Defendant contends that the trial court's denial of the motion to suppress and the State's argument overlooks Officer Kuykendoll's testimony that he made a pat-down search of defendant in the apartment, found no drugs or weapons, handcuffed defendant, and placed defendant under arrest in the apartment. Officer Kuykendoll testified that he arrested defendant in the apartment, handcuffed him, and although no weapons or contraband were found on his person, removed him from the apartment and brought him back to the parking lot. Defendant argues that the investigatory Terry stop developed into an unlawful arrest unsupported by probable cause after the police handcuffed defendant and took defendant into their custody and control . . . We find, based on this record, that the arrest occurred when the officers handcuffed defendant in the third-floor apartment. The officer testified to that effect (Tortorici, 205 Ill. App. 3d at 628), and the show of authority by the three uniformed armed police officers would permit a reasonable person to conclude that once he was handcuffed by the armed police officers he was not free to leave.

Petition for Writ at pp. App. 11-12.

Therefore, Petitioner misrepresents the fact about Kuykendoll placing Defendant under arrest in the apartment. This decisive fact invalidates Petitioner's argument.

Second, even though the police never found a gun in this case, Petitioner claims Kuykendoll reasonably suspected a gun was in the Jeep. The record, however, fails to show that Kuykendoll had a reasonable articulable suspicion that a gun was in the Jeep. In fact, the three officers never recovered a gun during this incident.

This Illinois appellate court noted Kuykendoll "felt" that Defendant was somehow involved with the gun shots. However, Kuykendoll's "feeling" did not constitute a reasonable articulable suspicion that a gun was in the Jeep. This appellate court paid close attention to Kuykendoll's failure to point to any objective facts or evidence suggesting that a gun might be in the Jeep:

> Kuykendoll did not see defendant commit any crimes before arresting him in the apartment. Defendant did not possess any weapons or narcotics. Kuykendoll conceded that he did not receive any information about defendant possessing or shooting a gun. Kuykendoll admitted he did not see anyone fire a gun at any time before the arrest of defendant. And while he was investigating what he thought were the sounds of gunshots, those sounds were coming from the vicinity of 5135 S. Federal Street. In the parking lot at 5135 S. Federal, Kuykendoll observed a group of between 3 to 10 black males. Kuykendoll and his partners were not acting on a description, but suspected someone in the group fired the gunshots. Kuykendoll testified that defendant was not a member of this group. Kuykendoll and his partners lost that group after chasing them. Kuykendoll and his partners then confronted defendant in a

> parking lot at 5100 S. State more then five minutes after they chased and lost the group from the parking lot at 5135 S. Federal . . . No evidence connected defendant with the building at 5135 S. Federal or with the original group of men chased by the police into that building from the parking lot at 5135 S. Federal. No evidence connected defendant to the gunshots the police believed they heard. Although no evidence connected defendant to the activity under investigation, the officers "felt" that defendant might have been involved in firing the shots they believed they heard. Based on that feeling, they conducted the Terry stop and protective search of defendant and found nothing incriminating. The stop and frisk of defendant did not confirm their suspicion. Once the pat-down search of defendant revealed no weapons and no contraband on defendant's person, the police had no basis to fear for their safety, had nothing to confirm their suspicion and had no specific and lawful reason to handcuff and further detain the defendant.

Petition for Writ at pp. App. 13-15.

Therefore, this record fails to establish a reasonable articulable suspicion for Kuykendoll's continued detention and transportation of Defendant in handcuffs back to the Jeep in the parking lot. *See People v. Brownlee*, 186 Ill.2d 501, 521 (1999).

Third, Petitioner simply glosses over the quality of Kuykendoll's testimony. Kuykendoll testified that he looked under an armrest and recovered a plastic bag containing cocaine from within the Jeep. (R. B6; B12; B24). In his police report, however, Kuykendoll recorded that

Delaware fled from the Jeep with a large plastic bag of cocaine in his possession during the chase to the apartment. (R. B25-26; B36).

In their opinion this Illinois appellate court expressly noted Kuykendoll's "mistake." (*See* Petition for Writ at p. App. 4).

Therefore, the above decisive factors undermine Petitioner's arguments. The Illinois appellate court's holding is proper in all respects and does not call for a review by this Court.

III. PETITIONER FAILS TO DEMONSTRATE ANY COMPELLING REASON FOR THIS COURT TO GRANT THIS PETITION

Petitioner fails to demonstrate any compelling reasons for this Court to grant this petition for writ of certiorari. In actuality, Petitioner is simply unhappy with the opinion of the Illinois appellate court. Nevertheless, the appellate court's holding is proper in all respects and does not call for a review by this Court.

Petitioner fails to demonstrate that the holding of this Illinois appellate court conflicts with the decision of another state court of last resort. Also, Petitioner fails to demonstrate that this Illinois appellate court holding conflicts with the decision of a United States court of appeals.

Furthermore, Petitioner fails to demonstrate that this Illinois appellate court holding conflicts with any decisions of this Court. In fact, the holding of this Illinois appellate court is in accordance with *Terry v. Ohio*, 392

U.S. 1, 19-20, 88 S.Ct. 1868, 1879 (1968) and *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26 (1983).

Petitioner's request to extend *United States v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973), is misplaced and is not a compelling reason for granting this petition. *Dombrowski* is not on point. *Dombrowski* involved the reasonableness of a standard searching procedure by a rural police department while impounding the cars of off duty police officers. In contrast, this case does not involve a standard searching practice by a rural police department. In this case, Defendant is not a police officer who is routinely armed with a gun. In fact, in this case Defendant never had a gun. Also, Petitioner's sparse legal authority for extending *Dombrowski* is unavailing.

Therefore, Petitioner fails to demonstrate any compelling reasons for this Honorable Court to grant this petition. (*See* Rule 10 of the Supreme Court of the United States). The Illinois appellate court's holding is proper in all respects and does not call for review by this Court.

CONCLUSION

WHEREFORE, for all of the reasons sets forth above, Defendant, Andre Delaware, respectfully requests this Honorable Court to deny this petition.

Respectfully submitted,

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